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JAMES M. BOYD, JR., Of Counsel

September 20, 2010

VIA E-MAIL

Mr. Phillip Isenberg
Chair, Delta Stewardship Council
650 Capitol Mall, Fifth Floor
Sacramento, California 95814

Re: Administrative Procedures Concerning Appeals – Submission of Record

Dear Mr. Isenberg:

Thank you for providing the opportunity to comment on the Council's draft administrative procedures concerning appeals. One of those proposed procedures – the proposed deadline for agencies whose actions are appealed to the Council to submit their administrative records – is not workable and should be modified to put the initial burden of production on the party that files the appeal. Accordingly, sections 4 and 6 of those proposed procedures should be revised. Specific proposed revisions are attached.

The current section 4(a) of those proposed procedures give agencies whose actions are appealed to the Council only 10 days from the time that they receive notice of an appeal to:

submit to the council . . . the record that was before the state or local agency at the time it made its certification, including a table of contents of documents contained therein and a brief chronology of events and actions relevant to the covered action

The current section 4(c) then states that an agency's failure:

to submit the record to the council on a timely basis as required by subparagraph (b) shall be grounds for the council to affirm the appeal on the basis that there was not substantial evidence presented to support the certification of consistency.

These proposed procedures are not workable because the administrative records that may be before agencies when they approve projects that may be appealed to the Council can be extremely large and it simply is not possible for an agency to assemble, organize and produce such a record's table of contents in 10 days. For example, CEQA requires that an administrative record for CEQA litigation contain, among other things, all project application materials, all staff reports, transcripts or minutes of relevant agency meetings and all correspondence submitted to the agency on the proposed CEQA document. (Public Resources Code § 21167.6(e).) Requiring an agency to submit all of these materials to the Council in a ten-day period and declaring that the agency's failure to do

Mr. Phillip Isenberg
September 20, 2010
Page 2

so will constitute grounds for upholding the appeal will encourage numerous appeals to the Council by parties in hopes that the relevant agencies will simply be unable to comply with the Council's rules on appeal.

The Council's proposed rules state that the reason such speed is required in handling appeals is that the Council has been given only brief periods in which to hear and decide appeals. While the statutes governing appeals to the Council do provide the Council with only limited periods of time, it would be possible to address this fact and still establish rules concerning the submission of records developed by agencies that equitably allocate the burdens of providing the Council with sufficient information to make its decisions. Such rules would:

1. Require parties filing appeals to submit, with their appeals, as much information as possible concerning the decision that they are appealing – such information should be available to those parties under the Public Records Act within their 30-day window to file their appeals;
2. Require agencies whose decisions are appealed to produce only that information from their administrative records that is relevant to their certifications of consistency with the Delta Plan, rather than their entire administrative record; and
3. Declare that the Council will decide an appeal based solely on the information submitted by the party filing the appeal and the agency whose action is appealed.

Such procedures would make the Council's task by streamlining the material submitted to the Council and requiring the parties to focus on the issues that are relevant to the Council's task, rather than all of the operational, economic, environmental and social issues that were relevant before the agency itself. I have attached proposed edits to the Council's administrative procedures that would implement the approach proposed by this letter.

Thank you again for the opportunity to comment on the Council's proposed procedures.

Kind regards,

Ryan S. Bezerra

RSB:tmo

Enclosure

7021/Delta Council/L092010rsb.wpd

cc (via e-mail, w/encl.):

Chris Stevens, General Counsel

PROPOSED EDITS TO ADMINISTRATIVE PROCEDURES GOVERNING APPEALS

4. b) A state or local agency shall submit to the council, no later than 10 days after receiving notice of an appeal pursuant to Paragraph 8, the information on which the record that was before the state or local agency relied in adopting its certification at the time it made its certification. Within 15 days of that submission, the agency shall submit to the council, ~~including~~ a table of contents ~~for the information that the agency has submitted as supporting its certification of documents contained therein~~ and a brief chronology of events and actions relevant to the covered action. ~~The record shall be certified by the state or local agency as being "full and complete."~~ The council will decide the appeal based solely on the information submitted by the party filing the appeal under Paragraph 6 and the information submitted by the agency under this subparagraph 4(b). Given the tight, statutory deadlines for hearing and deciding appeals, a state or local agency is nevertheless strongly encouraged to submit the record at the time it files its certification of consistency, to ensure the opportunity for thorough review by the council in the event of an appeal.
 - c) The failure by a state or local agency to submit the record to the council on a timely basis as required by subparagraph (b), shall be grounds for the council to affirm the appeal on the basis that there was not substantial evidence to support the certification or consistency.
6. The appeal shall clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan. The appeal shall be in writing and set forth the following information:
 - a) Appellant's name and address;
 - b) The name and address of the party, if any, whose proposal is the subject of the appeal;
 - c) A description of the covered action that is the subject of the state or local public agency certification;
 - d) The identity of the state or local government body whose certification is being appealed;
 - e) The specific grounds for appeal; and
 - f) A detailed statement of facts on which the appeal is based.

The appeal shall be filed in electronic form. In addition, the appellant shall deliver to the council all documents or other information on which the appeal is based. The appellant shall ensure that the council receives those documents or other information within two business days of when the appellant files its appeal.